Supreme Court, U. S.
FILED
JUL 3 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-20

JIM FITZGERALD,

Petitioner,

v.

INTERMOUNTAIN FARMERS ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF UTAH

James N. Barber
BARBER & VERHOEF
431 South Third East
Salt Lake City, Utah 84111

THOMAS R. BLONQUIST
Second Floor
Metropolitan Law Building
431 South Third East
Salt Lake City, Utah 84111
Attorneys for Petitioner

J. Thomas Greene
Dorothy C. Pleshe
CALLISTER, GREENE & NEBEKER
800 Kennecott Building
Salt Lake City, Utah 84133

DE LYLE H. CONDIE
1224 Kennecott Building
Salt Lake City, Utah 84133
Attorneys for
Intermountain Farmers Association

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Question Presented	3
Statement of Material Facts	3
Reasons for Granting the Writ	6
Conclusion	12
Appendix A	i
Appendix B	viii
Appendix C	ix

CITATIONS

Constitutions:

U.S.C.A. Const. Amend. 5	3
U.S.C.A. Const. Amend. 14	3
28 U.S.C.A. 1257(3)	2
Utah Constitution, Art. VIII, Sec. 2	2, 4

Cases:

Berger v. U.S., 255 U.S. 22, 65 L.Ed. 481, 41 S.Ct. 230 (1921)	10
Botts v. U.S., 413 F.2d 41 (9th Cir., 1969)	11
Hanger v. U.S., 398 F.2d 91 (8th Cir., 1968), cert. den. 393 U.S. 1119, 22 L.Ed 2d 124, 89 S.Ct. 995 (1969), reh. den. 395 U.S. 971, 23 L.Ed. 2d 761, 89 S.Ct. 2106 (1969)	10
In Re Murchison, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955)	6, 8, 9
Johnson v. Mississippi, 403 U.S. 212, 29 L.Ed. 2d 423, 91 S.Ct. 1778 (1971)	6

INDEX—Continued

	Page
Knapp v. Kinsey, 232 F.2d 458 (6th Cir., 1956)	11
Martin v. U.S., 285 F.2d 150 (10th Cir., 1960), cert. den. 365 U.S. 853, 5 L.Ed. 2d 816, 81 S. Ct. 818 (1961), reh. den. 366 U.S. 915, 6 L.Ed. 2d 239, 81 S.Ct. 1088 (1961)	11
Mayberry v. Pennsylvania, 400 U.S. 455, 27 L.Ed. 2d 532, 91 S.Ct. 499 (1971)	8
Offutt v. U.S., 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11 (1954)	8
Palmer v. U.S., 249 F.2d 8 (10th Cir., 1957)	11
Petrey v. Holliday, 178 Ky. 410, 199 S.W. 67 (1917)	12
Rapp v. Van Dusen, 350 F.2d 806 (3rd Cir., (1965)	9
State ex. rel. Turner v. Marshall, 123 Ohio St. 586, 176 N.E. 454 (1931)	8
Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir., 1965), cert. den. 383 U.S. 936, 15 L.Ed. 2d 1966, 86 S.Ct. 1066 (1966)	9
Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437, 50 A.L.R. 1243 (1926)	6, 8
U.S. v. Bray, 546 F.2d 851 (10th Cir., 1976)	11
U.S. v. Ritter, 540 F.2d 459 (10th Cir., 1976), cert. den. *Olson Farms v. U.S.*, 429 U.S. 951, 50 L.Ed. 2d 319, 97 S.Ct. 370 (1976)	10
U.S. v. Sciuto, 531 F.2d 842 (7th Cir., 1976)	6
Webbe v. McGhie Land Title Company, 549 F.2d 1358 (10th Cir., 1977)	9
Withrow v. Larkin, 421 U.S. 35, 43 L.Ed. 2d 712, 95 S.Ct. 1456 (1975)	6, 7
Statutes:	
Rule 76(e), Utah Rules of Civil Procedure	2, 5

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

JIM FITZGERALD,
Petitioner,

v.

INTERMOUNTAIN FARMERS ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF UTAH

Jim Fitzgerald petitions for a Writ of Certiorari to review a refusal of the Supreme Court of Utah to grant the motion of the petitioner, Jim Fitzgerald, defendant and appellant below, to have disqualified, on the grounds of bias and prejudice, a judge who, sitting temporarily as a member of the Utah Supreme Court, participated in the decision on petitioner's appeal and authored the court's opinion.

OPINION BELOW

The majority opinion of the Utah Supreme Court in the case of *Intermountain Farmers Association, plaintiff*, vs. *Jim Fitzgerald, defendant*, (Appendix A, pages xx-xx) is reported at 542 P.2d 1162, Utah, 1978. The

Utah Supreme Court's denial of petitioner's motion to have disqualified a member of the court (Appendix B, pages xx-xx) is unreported. The Utah Supreme Court's denial of petitioner's petition for rehearing (Appendix C, pages xx-xx) is unreported.

JURISDICTION

The decision of the Utah Supreme Court was entered on January 21, 1978. On February 27, 1978, petitioner filed a motion asking that Judge Duffy Palmer be disqualified. (Judge Palmer is a judge of Utah's second judicial district and was asked to sit as a member of the Utah Supreme Court, as provided for by Art. VIII, Sec. 2, of the Utah Constitution, in place of the Supreme Court Justice who disqualified himself because he was the trial judge below. Judge Palmer also authored the opinion of the court.) Plaintiff's motion came on for hearing on February 27, 1978, and the Utah Supreme Court denied the motion. That same day, petitioner filed a petition for rehearing, pursuant to Rule 76(e) of the Utah Rules of Civil Procedure, asking the court to reconsider its opinion in the case. The petition for rehearing was denied on April 7, 1978.

Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C.A. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty or property without due process of law . . . [U.S.C.A. Const. Amend. 5, p. 4.]

The Fourteenth Amendment to the United States Constitution provides:

> . . . nor shall any state deprive any person of life, liberty, or property without due process of law . . . [U.S.C.A. Const. Amend. 14, Sec. 1, p. 4.]

QUESTION PRESENTED

Has a person been denied due process of law where his case, on appeal, is considered by a judge who is closely related by blood to a person who is in a management position in a corporation which is a party to the case and where such person has a direct and material interest in the outcome of the case?

STATEMENT OF MATERIAL FACTS

Intermountain Farmers, plaintiff in the lower court, sued Jim Fitzgerald, a dairy farmer, to collect money owing for cattle feed sold by Intermountain Farmers to Mr. Fitzgerald. Mr. Fitzgerald counterclaimed for damages, alleging that Intermountain Farmers was negligent in that it sold him defective feed, which caused injury and death to his dairy cattle and reduced milk production. After a nine-day jury trial, judgment was entered in favor of Intermountain Farmers on its complaint and in favor of Mr. Fitzgerald on his counterclaim in the amount of $226,330.57. No appeal was taken from the judgment

in Intermountain Farmers' favor, but Intermountain Farmers appealed the judgment against it.

Utah Supreme Court Justice Gordon Hall (who, prior to his being named to the state's high court, had been the trial judge) properly disqualified himself from participating in the case on appeal. Pursuant to Art. VIII, Sec 2, of the Utah Constitution, Judge Duffy Palmer, a judge of Utah's second judicial district, was asked to sit as a member of the high court.

The Utah Supreme Court, in an opinion authored by Judge Palmer, reversed the decision of the trial court and entered a judgment in favor of Intermountain Farmers.

After the opinion was handed down, Jim Fitzgerald learned that Judge Palmer was the uncle of Steven Lee Palmer, who was at all times material a division manager of Intermountain Farmers. In that management position, Steven Lee Palmer is directly answerable to the president of Intermountain Farmers and has a direct and material interest in the outcome of the appeal. At no time during the proceedings did Judge Palmer disclose to Mr. Fitzgerald or his attorney his family relationship to the management of Intermountain Farmers.

Mr. Fitzgerald had not known of this relationship before the opinion was released and had no reason to investigate any possible relationship. In fact, Mr. Fitzgerald did not even have reason to know that Judge Palmer had been selected to sit with the Supreme Court to consider his case. Since the appeal had been submitted on the briefs, there was no oral argument at which the fifth judge was announced. (Before the opinion was released,

Mr. Fitzgerald's attorney had learned that Judge Palmer was participating in the decision, but he did not know Judge Palmer was authoring the opinion which was submitted to the other members of the court.) Mr. Fitzgerald and his attorney learned of the relationship between Judge Palmer and Intermountain Farmers when a person, previously unknown to Mr. Fitzgerald, contacted him after reading a newspaper account of the case in which it was stated that Judge Palmer authored the opinion. This person informed Mr. Fitzgerald that the judge who considered his case was related to a highly placed manager at Intermountain Farmers. Mr. Fitzgerald and his attorney verified this information and then filed a motion with the Utah Supreme Court asking that Judge Palmer be disqualified and that the court reconsider the case. In his affidavit in support of the motion to disqualify Judge Palmer, Mr. Fitzgerald's counsel pointed out instances where the opinion completely ignored competent evidence that had been introduced at the trial and ignored the findings of the jury, all of which demonstrated that Judge Palmer, in his deliberations, had been dictated by prejudice and bias in favor of Intermountain Farmers. The motion came on for hearing on February 27, 1978, but the court characterized it as a disguised petition for rehearing. The chief justice stated that if Judge Palmer was biased in his decision that bias would be apparent in a petition for rehearing, and if a rehearing was granted, the problem, if one existed, would be solved.

That same day, Mr. Fitzgerald filed his petition for rehearing, pursuant to Rule 76(e) of the Utah Rules of Civil Procedure. The petition and its supporting brief

identified numerous errors of law and incorrect statements in the opinion Judge Palmer wrote.

The court denied Mr. Fitzgerald's petition for rehearing on April 7, 1978.

REASONS FOR GRANTING THE WRIT

I.

It is a basic requisite of due process that a person is entitled to have his case tried by a fair and impartial jury whose decisions are untainted by bias or prejudice. *Withrow v. Larkin,* 421 U.S. 35, 43 L.Ed. 2d 712, 95 S.Ct. 1456 (1975); *Johnson v. Mississippi,* 403 U.S. 212, 29 L.Ed. 2d 423, 91 S.Ct. 1778 (1971); *In Re Murchison,* 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955); *Tumey v. Ohio,* 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437, 50 A.L.R. 1243 (1926); *U.S. v. Sciuto,* 531 F.2d 842 (7th Cir., 1976). This requisite holds firm whether the case is at the trial level, on intermediate appeal, or at the highest level of appeal.

To ensure due process fairness, both statutes and state constitutions have identified various situations and relationships in which a judge is required to disqualify himself. But the fact that in a particular case the judge does not fit precisely into a proscribed situation or relationship should not mean he is not required to disqualify himself. In light of the due process requirements of a fair, impartial, and unbiased judge, such laws and constitutional provisions should not be construed as enumerating exclusively the cases in which a judge must be disqualified. Rather, such laws are designed to identify sit-

uations and relationships where the probability of bias and prejudice is so great or where a judge's fairness and impartiality are so likely to be questioned that the interests of justice and due process are best served by the judge's being disqualified. *Withrow v. Larkin,* supra.

The law does not permit a judge, who admittedly falls into a proscribed situation or relationship, to refuse to disqualify himself on the grounds that he, nevertheless, is able to remain detached and to decide fairly and without bias. Conversly, the fact that a law identifies specific situations and relationships where a judge may not act should not mean there are no other situations and relationships where due process would require disqualification. If the due process mandate of a fair and impartial judge is to have meaning, a judge must disqualify himself whenever the likelihood of bias or prejudice is great or whenever a judge's fairness and impartiality are likely to be questioned. Due process should require nothing less.

In this case, Judge Duffy Palmer, a lower court judge, was asked to sit with the Utah Supreme Court to consider a case involving a corporation where his nephew, the son of his brother, was in a key management position. The corporate party was appealing a judgment of more than $226,000. The nephew is directly answerable to the president of the corporation and is manager of the Farm Services Division of Intermountain Farmers. The likelihood of Judge Palmer looking at the case with bias and prejudice, whether conscious or subconscious, is too great to permit him to participate. The correctness of the decision is immaterial, as is the actual presence of

bias and prejudice. A litigant cannot be subjected to doubt about a judge's fairness and impartiality. He is entitled not only to a fair and impartial trial but also to the belief that he is getting a fair and impartial trial. *State ex. rel. Turner v. Marshall*, 123 Ohio St. 586, 176 N.E. 454 (1931). Where a judge's nephew is in a key management position with a corporation which is appealing a large judgment against it, there is a very strong reason to question the judge's ability to be impartial and unbiased. In such a situation, due process should require nothing less than disqualification.

"[O]ur system of law has always endeavored to prevent even the probability of unfairness . . . Circumstances and relationships must be considered . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In Re Murchison*, supra. The constitutional requirements are "not satisfied by the arguments that men of the highest honor" would not abandon their duties to weigh a case fairly and impartially. *Tumey v. Ohio*, supra. Due process rights cannot be compromised.

II.

Due process entitles a person not only to a fair and impartial trial conducted by an unbiased judge without prejudice but also to the appearance of a fair and impartial judge. "[J]ustice must satisfy the appearance of justice." *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L.Ed. 2d 532, 91 S.Ct. 499 (1971); *Offutt v. U.S.*, 348

U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11 (1954); *In Re Murchison*, supra.

That Mr. Fitzgerald was deprived of the appearance of a fair and impartial judge is evidenced by the manner in which he discovered Judge Palmer's familial relationship to a member of Intermountain Farmers' management. A person, who did not even know Mr. Fitzgerald, read a newspaper account of the case which stated that Judge Palmer had authored the court's opinion and then contacted Mr. Fitzgerald to inform him that the case had been decided by Judge Palmer in a way that greatly benefitted his nephew. It can hardly be said that Judge Palmer gave the appearance of being an unbiased judge when a member of the general public who did not even know Mr. Fitzgerald thought that Mr. Fitzgerald's case had not been decided by an impartial judge. The appearance of a fair and impartial judgment had been destroyed, in violation of Mr. Fitzgerald's due process rights.

"For the proper administration of justice requires of a judge not only actual impartiality but also the appearance of a detached impartiality." *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir., 1965), cert den. 383 U.S. 936, 15 L.Ed. 2d 1966, 86 S.Ct. 1066 (1966); *Rapp v. Van Dusen*, 350 F.2d 806 (3rd Cir., 1965). "[A]ppearance of impartiality is virtually as important as the fact of impartiality." *Webbe v. McGhie Land Title Company*, 549 F.2d 1358 (10th Cir., 1977).

The law recognizes that disqualification is appropriate not only where there is actual or apparent bias and prejudice but also when the circumstances are such that

the judge's impartiality might be reasonably questioned. See a discussion of this point in *U.S. v. Ritter*, 540 F.2d 459 (10th Cir., 1976), cert. den. *Olson Farms v. U.S.*, 429 U.S. 951, 50 L.Ed. 2d 319, 97 S.Ct. 370 (1976).

III.

Mr. Fitzgerald's counsel made a motion for Judge Palmer's disqualification at the earliest opportunity. Neither Mr. Fitzgerald nor his counsel initially knew that Judge Palmer had been selected to consider this appeal or that he would author the opinion nor did they know of Judge Palmer's familial relationship to a member of Intermountain Farmers' management until after the Supreme Court's decision had been handed down. As soon as Mr. Fitzgerald and his counsel learned of the familial relationship and were able to verify it, a motion to disqualify Judge Palmer was filed.

The Utah Supreme Court, however, refused to grant the motion, choosing to characterize it as a disguised petition for rehearing. The chief justice pointed out that, if Judge Palmer were biased and prejudiced in favor of Intermountain Farmers, instances of his bias and prejudice would be apparent in a petition for rehearing and, if indeed bias and prejudice were evident, a new hearing would be granted and the case would be reconsidered.

A judge cannot be disqualified on the grounds of bias and prejudice when a charge of bias is based on nothing more than rulings in the case. *Burger v. U.S.*, 255 U.S. 22, 65 L.Ed. 481, 41 S.Ct. 230 (1921); *Hanger v. U.S.*, 398 F.2d 91 (8th Cir., 1968) cert. den. 393 U.S.

1119, 22 L.Ed. 124, 89 S.Ct. 995 (1969), reh. den. 395 U.S. 971, 23 L.Ed. 2d 761, 89 S.Ct. 2106 (1969). Nor can one scruitinize the decision of an appellate judge searching for errors of law as evidence of bias and prejudice. Adverse rulings are not grounds for disqualification. *U.S. v. Bray*, 546 F.2d 851 (10th Cir., 1976); *Botts v. U.S.*, 413 F.2d 41 (9th Cir., 1969); *Martin v. U.S.*, 285 F.2d 150 (10th Cir., 1960), cert. den. 365 U.S. 853, 5 L.Ed. 2d 816, 81 S.Ct. 818 (1961), reh. den. 366 U.S. 915, 6 L.Ed. 2d 239, 81 S.Ct. 1088 (1961); *Palmer v. U.S.*, 249 F.2d 8 (10th Cir., 1957). One cannot look at erroneous rulings and say a judge is biased and prejudiced because he made those rulings. Rather, in furnishing a basis for disqualification, the situation must be such that the bias and prejudice and the facts from which it stems must have existed before the case came before the judge. *Knapp v. Kinsey*, 232 F.2d 458 (6th Cir., 1956). If, for some reason, a judge should have been disqualified but was not and the move to disqualify him comes only after the trial or after a decision has been rendered, erroneous rulings of law can be viewed only as results of the preexisting bias and prejudice; but in and of themselves, they cannot be the sole evidence of bias and prejudice. If the latter were permissable, a judge who was biased and prejudiced would be allowed to hear and consider a case, and if he made no erroneous rulings of law, his decision would stand; but if he made errors of law, he would be disqualified. Clearly, this is not proper procedure. A judge who has heard a case at trial or considered a case on appeal but who should have been disqualified will be disqualified

even if his decision was correct and proper. *Petrey v. Holliday*, 178 Ky. 410, 199 S.W. 67 (1917).

In the affidavit supporting the motion to disqualify Judge Palmer, counsel pointed out the familial relationship between Judge Palmer and the division manager of Intermountain Farmers and also pointed out conclusions stated by Judge Palmer in the court's opinion which evidenced bias. For example, in the opinion, Judge Palmer stated there was no direct evidence of certain facts determined at trial and, in his affidavit, Mr. Fitzgerald's counsel enumerated instances of direct evidence on those very points. These instances were, in actuality, immaterial on the question of whether Judge Palmer should have been disqualified as the familial relationship involved was the reason for disqualification; but they were nevertheless included in the affidavit as examples of what resulted from Judge Palmer's bias.

The Utah Supreme Court, however, chose not to consider this familial relationship question but, in effect, told Mr. Fitzgerald that, if Judge Palmer was prejudiced, that prejudice would be apparent in a petition for rehearing in which errors in the decision could be set forward. Such a method of determining whether a judge should be disqualified is improper and, as such, is a violation of due process.

CONCLUSION

I.

Due process requires a judge to be fair, impartial, unbiased, and unprejudiced. The fact that a judge is

closely related by blood to the management of a corporate party in a case raises sufficient question as to his ability to be unbiased, and his disqualification is required.

II.

Due process requires that the appearance of justice be maintained. Where reasonable question arises as to a judge's impartiality, he should be disqualified in the interest of the appearance of justice.

III.

Adverse rulings cannot be used to determine that a judge was biased and prejudiced nor can proper rulings or correct decisions be used to conclude that he was not.

Respectfully submitted,

James N. Barber
BARBER & VERHOEF
431 South Third East
Salt Lake City, Utah 84111

THOMAS R. BLONQUIST
Second Floor
Metropolitan Law Building
431 South Third East
Salt Lake City, Utah 84111
Attorneys for Petitioner

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

Intermountain Farmers Association, a Utah corporation,
Plaintiff and Appellant,

v.

Jim Fitzgerald,
Defendant and Respondent.

Jan. 25 Rcc'd
No. 14723
FILED
January 24, 1978

Geoffrey J. Butler,
Clerk

PALMER, District Judge:

1. This case was brought by the plaintiff to recover the amount due on open account for the sale of feed to the defendant in the sum of $41,625.00 with interest and reasonable attorney's fees. This is an appeal from a money judgment in favor of the defendant and respondent, (defendant herein) on his counterclaim.

2. The defendant originally answered the plaintiff's complaint with a general denial. Some months later the defendant was permitted by the trial court to file an amended answer and counterclaim for alleged injuries and death to defendant's dairy herd allegedly caused by toxic levels of urea, and alleged inconsistencies and deficiences of protein in the feed sold by the plaintiff to the defendant.

3. There are five allegations made on the appeal as follows:

One, the plaintiff alleges that the court did not grant attorney's fees as provided in the contractual arrangement between the plaintiff and the defendant. The defendant has agreed that attorney's fees should have been allowed, thus there is no dispute on appeal on this item.

Two, the plaintiff alleges the instructions to the jury relating solely to the issue of punitive damages was prejudicial error.

Three, the instruction to the jury to the effect of a violation of a statute as it affects negligence was prejudicial error.

Four, plaintiff's Motion for a Directed Verdict should be granted and was error on the part of the court not to have granted as requested by the plaintiff.

Five, prejudicial error was committed in the admission of evidence.

It is not necessary for this Court to treat the first point of appeal by the plaintiff since the defendant has agreed that an award of a reasonable attorney's fee should have been made.

The next point of contention is that evidence received was on its face objectionable, but was allowed by the trial court for the purposes of relating, "solely to the issue of alleged punitive damage." It is the opinion of the Court that by allowing such evidence in without clarification was prejudicial error and the case should be reversed on this matter alone.

The Court's instruction number twenty (20) gave the following instruction:

> You are instructed that *certain exhibits hereinafter enumerated* have been *offered and admitted into evidence* by the court as *bearing upon the question of notice* to the plaintiff of a deficiency in its feed. You are instructed that *said exhibits should not be considered for any other purpose or as bearing upon any other issue and do not constitute proof of any other claim* made by the counterclaimant in this case. [Emphasis added.]

However, after giving the instruction, the trial court failed to advise the jury as to the numbers of the exhibits that were so restricted. Thus, the jury reviewed all the exhibits without restriction, when in fact some of the exhibits should have been restricted to the issue of punitive damages. The admonition of the court as provided in instruction number twenty was not sufficient to overcome the prejudicial error created by allowing such evidence in.

The transcript and the abstract were filled with objections of the plaintiff in an attempt to keep such exhibits out because they were so remote in time and place as not to be pertinent to this plaintiff. In reading the abstract and the transcript, this Court can find no direct evidence of the plaintiff's feed being harmful; no tests by state chemists of any toxicity or existence of urea in the feed bought by the defendant from the plaintiff's Spanish Fork Branch. The only contaminated food came from different branches and this feed was not sold to the defendant. As a matter of fact, during the time plaintiff's feed was fed to the defendant's cattle, the defendant's cattle's milk production increased from 372 pounds less

than the Salt Lake County yearly average production per cow to 1,657 over the yearly average of the Salt Lake County production per cow.

The next matter appealed from was the instruction to the jury on the issue of negligence constituting prejudicial error. The court instructed that "the feed in question was *manufactured* in violation of the statute, there was negligence per se *as a matter of law.*"

This Court has long held that the violation of a statute does not necessarily constitute negligence per se and may be considered only as evidence of negligence, and thus the instruction of the court is prejudicial error and should be reversed on that ground. See *Thompson v. Ford Motor Co.*, 16 Utah 2d 30, 395 P.2d 62 (1964). Justice Crockett, in the Thompson case, noted that violation of a safety standard set by statute or ordinance may be regarded as "prima facie evidence of negligence, but is subject to justification or excuse if the evidence is such that it reasonably could be found." See also *White v. Shipley*, 48 Utah 496, 160 Pac. 441 (1916); *Klafta v. Smith*, 17 Utah 2d 65, 404 P.2d 659.

The Thompson case is the leading case in the State of Utah. See the citation set forth in more detail in the Thompson case.

The next pointed cited as error of the trial court was that evidence offered and received was insufficient as a matter of law to prove that the plaintiff's negligence proximately caused the defendant-counterclaimant's damage.

A careful reading of the transcript and the abstract

substantiates the plaintiff's contentions. Any food shown to be contaminated in the evidence was from plants other than the Spanish Fork Plant where the defendant purchased its feed from the plaintiff. There was no showing of any causal connection between the alleged harmful feed and the death, sickness or loss of production of the defendant's dairy cattle. As a matter of fact, it was more reasonable to presume that any death, sickness or loss of production was caused from the feeding of the defendant's own feed since no contaminated feed was shown to have been purchased from plaintiff's plant by the defendant. The counterclaim should have been dismissed on plaintiff's motion after the presentation of all the evidence by the defendant on its counterclaim.

This Court has recognized that a directed verdict is proper where the proof fails to disclose any controversies as to controlling factor where there is lack of proof of one or more material elements in a cause of action asserted. See *Flynn v. W. P. Harlin Construction Co.*, 29 Utah 2d 317, 509 P.2d 356 (1973).

In this case, there was no direct evidence produced by the defendants to show that the plaintiff's dairy feed consumed by the defendant's cows, contained an excess of urea, deficiency of protein, or any inconsistencies in the amount of protein that would have caused the alleged damage.

In addition thereto, there is no evidence in the record to justify a conclusion that the feed caused the death, diminished milk supply, or any other damage to the de-

fendant's cattle. Circumstantial evidence presented was totally lacking.

The appellant's last claim of error is that prejudice was committed in the admission of evidence. The record is clear that the court allowed defendant to read in material contained in exhibits that had been previously denied admission. Rule 70 of the Utah Rules of Evidence prohibits proof of contents of a writing, other than by the writing itself, with few exceptions. None of said exceptions are noted here.

The record reveals that general revenue records, magazine articles, and other such evidence were not allowed in, but were used as the basis of testimony but were never marked as exhibits or introduced in evidence.

In the *Watson Land Co. v. Rio Grande Oil Co.*, 61 C.A. 2d 269, 142 P.2d 950, the court therein stated:

> The testimony of defendant's president, that the oil his company was producing had a gravity of less than 14, and no probative value, in view of facts that, as revealed by his subsequent answers, he did not speak of his own knowledge, but based his statement on the "run tickets" of the refineries which bought the products of his wells, and there was no showing of the basis on which the run tickets were computed.

The conduct of the defendant, reading the exhibits that had been excluded or refused, circumvented the very rule of law provided in Rule 70 of the Utah Rules of Evidence. For though the exhibits were refused, the unsubstantiated information contained in those exhibits were

nevertheless presented directly to the jury for its full consideration by the defendant's verbatim reading of the exhibits.

For these reasons set forth above, this Court affirms the judgment for the plaintiff granted below in the sum of $41,625.00 plus interest and attorney's fees. The interest and attorney's fees to be determined below.

For the reasons stated above, this Court reverses and dismisses the case for every other purpose except the setting of attorney's fees and determining the amount of interest.

WE CONCUR:

A. H. Ellett, Chief Justice

J. Allan Crockett, Justice

Maughan and Wilkins, Justices, concur in result.

Hall, Justice, having disqualified himself, does not participate herein.

APPENDIX B

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

February 27, 1978

Office of the Clerk

THOMAS R. BLONQUIST, ESQUIRE
ATTORNEY AT LAW
METROPOLITAN LAW BLDG., 2d FLOOR
SALT LAKE CITY, UTAH 84111

Intermountain Farmers Association,
a Utah corporation,
Plaintiff and Appellant,

v. No. 14723

Jim Fitzgerald,
Defendant and Respondent.

This day respondent's motion for an order disqu[illegible]
J. Duffy Palmer, District Judge, and granting r[illegible]
denied.

Geoffrey J. Butler, Clerk

APPENDIX C

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

April 7, 1978

Office of the Clerk

CALLISTER, GREENE & NEBEKER
ATTORNEYS AT LAW
800 KENNECOTT BUILDING
SALT LAKE CITY, UTAH 84133

Attention: J. Thomas Greene, Esquire
DeLyle H. Condie, Esquire
Dorothy C. Pleshe, Esquire

Intermountain Farmers Association,
a Utah corporation,
Plaintiff and Appellant,

v. No. 14723

Jim Fitzgerald,
Defendant and Respondent.

This day petition for rehearing denied.

Geoffrey J. Butler, Clerk

cc: Tom R. Blonquist, Esquire

Supreme Court, U. S.
FILED
AUG 1 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-20

JIM FITZGERALD,

Petitioner,

v.

INTERMOUNTAIN FARMERS ASSOCIATION

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. Thomas Greene
Dorothy C. Pleshe
CALLISTER, GREENE & NEBEKER
800 Kennecott Building
Salt Lake City, Utah 84133

DE LYLE H. CONDIE
500 Kennecott Building
Salt Lake City, Utah 84133
Attorneys for Intermountain Farmers Association

James N. Barber
BARBER & VERHOFF
431 South Third East
Salt Lake City, Utah 84111

THOMAS R. BLONQUIST
Second Floor
Metropolitan Law Building
431 South Third East
Salt Lake City, Utah 84111
Attorneys for Petitioner

INDEX

Statement of Material Facts 1

I. The Petition for Writ of Certiorari is Not Timely 4

II. The Petition for Writ of Certiorari Does Not Set Forth Grievances Reviewable by This Court 6

III. Petitioner Has Failed to Raise a Constitutional Issue 8

IV. There Was No Constitutionally Prohibited Bias or Prejudice Nor the Appearance Thereof in the Circumstances of this Case 9

Conclusion 10

Appendix A i

Appendix B iii

Appendix C iv

CITATIONS

Constitutions:

Utah Constitution, Article VIII, Section 13 3

Cases:

Herb v. Pitcairn, 324 U.S. 117, 89 L. Ed 789 7

Laird v. Tatum, 409 U.S. 824, 34 L. Ed 2d 50, 93 S. Ct. 7 10

Parish v. Board of Commissioners of Alabama State, 524 F.2d 98 9

Tumey v. Ohio, 273 U.S. 510, 71 L. Ed 749, 47 S. Ct. 437, 50 A.L.R. 1243 9

U.S. v. Corr, 434 F. Supp 408 9

Statutes:

Rule 63(b), Utah Rules of Civil Procedure 4

Utah Code Annotated, Section 78-7-1(2) 3

Canon 3C(1)(d), Judicial Code of Ethics 9

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

JIM FITZGERALD,

Petitioner,

v.

INTERMOUNTAIN FARMERS ASSOCIATION

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

This brief is filed in opposition to Petition for Writ of Certiorari which was served upon Respondent on July 3, 1978. For the reasons hereinafter set forth, the said Petition is not timely, not reviewable and in all events is without merit.

STATEMENT OF MATERIAL FACTS

Petitioner has not chosen to certify any documents whatsoever to this Court in connection with this case, but rather relies entirely upon its Petition for Writ of Certiorari, to which is attached as appendices a copy of the decision of the Supreme Court of Utah and its subsequent Orders denying Petitioner's Motion to Disqualify one of the members of the Court, and denying Petition for Rehearing. There is attached as Appendices to this Response

a copy of the Motion to Disqualify which was filed with the Supreme Court of Utah on February 17, 1978 (Appendix A), a copy of the Order dated February 27, 1978, denying the Motion to Disqualify (Appendix B), and a copy of the Memorandum of Law filed before the Supreme Court of Utah by Respondent which sets forth reasons why there were no grounds for disqualification under Utah law (Appendix C). These items speak for themselves, and there is no need to go beyond them for a dispositive ruling here. However, Petitioner has chosen to expand that record with certain statements not contained in the record, including wholly unsubstantiated hearsay statements by some unidentified person who supposedly in reading a newspaper called to the attention of Petitioner certain alleged facts (Petition, p. 9). Certain other statements not supported in the record are also set forth in the Petition (see Petition at pp. 4, 5, 10), but although such are immaterial and in fact not supported or supportable, even in the presence thereof there is no valid factual foundation laid for reversing the decision of the Supreme Court of Utah.

The operative facts are:

• Judge J. Duffy Palmer was selected to sit by appointment as one of the five members of the Supreme Court of Utah, under well recognized and challenged procedure for filling a vacancy in the hearing of particular cases.

• Petitioner and/or his counsel knew that Judge Palmer was sitting as a member of the Court before its initial decision and made no objection (Petition, p. 5).

• Petitioner filed a Motion to Disqualify Judge Palmer on February 17, 1978 (attached Appendix A).

• Respondent filed a Memorandum of Law opposing the Motion (attached Appendix C).

• An oral hearing before the Supreme Court of Utah occurred before the full five man Supreme Court of Utah on February 27, 1978.

• The asserted grounds for disqualification of Judge Palmer were as follows:

— Violation of the Constitution of the State of Utah, Article XIII, Section 13.[1]

— Violation of a provision of Utah law[2]

— Violation of a rule of Utah procedure.[3]

• On February 27, 1978, the Supreme Court of Utah entered an Order denying the Motion to Disqualify Judge Palmer. (The said Order is attached as Appendix B to the Petition for Writ of Certiorari, and also as Appendix B to this Brief in Opposition.)

---

[1]The Constitution of the State of Utah, Article VIII, Section 13, reads as follows:

> Except by consent of all parties, no judge of the Supreme or inferior courts shall preside in the trial of any cause where either of the parties shall be connected with him by affinity or a consanguinity within the degree of first cousin, or in which he may have been of counsel, or in the trial of which he may have presided in any inferior court.

[2]Utah Code Annotated, Section 78-7-1 (2) provides as follows:

> Except by consent of all parties, no justice, judge or justice of the peace shall sit or act as such in any action or proceeding:
>
> (1) . . .
>
> (2) When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of common law . . .

I.

THE PETITION FOR WRIT OF CERTIORARI IS NOT TIMELY

It is apparent on the face of the Petition for Writ of Certiorari herein that it is not timely, in that it was filed more than 90 days from the date of the Order by the Supreme Court of Utah here complained of. The Order asserted to be in error was entered February 27, 1978. That is the Order which constituted "refusal of the Supreme Court of Utah" to grant the motion of the petitioner to disqualify one of five judges who was sitting as a member of the Utah Supreme Court (Petition, p. 1). The Petition

[3]Rule 63(b), Utah Rules of Civil Procedure provides:

> (b) Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.
>
> Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. If the judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge (naming him) of the same court or of a court of like jurisdiction, which judge shall then pass upon the legal sufficiency of the affidavit. If the judge against whom the affidavit is directed does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient another judge must be called in to try the case or determine the matter in question. No party shall be entitled in any case to file more than one affidavit and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

herein makes it abundantly clear that the refusal of the Supreme Court of Utah here attacked was "denial of petitioner's motion to have disqualified a member of the court" (Petition, p. 2). For convenience in reference, the said Motion to Disqualify is attached hereto as Appendix A, and the Order of February 27, 1978, denying said Motion is attached hereto as Appendix B.

It is equally clear from the Petition for Writ of Certiorari that even though a Petition for Rehearing of the decision of the Supreme Court of Utah was filed subsequent to (later on in the same day) the Order of the Supreme Court of Utah which denied the Motion to Disqualify, there was nothing in that Petition for Rehearing calculated to cause disqualification of the judge in question. The said Petition for Rehearing contained recitations of alleged errors of fact and law, which Petitioner admits were not calculated to produce a decision of disqualification, but rather were "immaterial on the question of whether Judge Palmer should have been disqualified . . ." (Petition, p. 12).

The Motion and Affidavit in support thereof, which set forth the claimed "familial relationship" aimed at causing disqualification of Judge Palmer were dispositively ruled upon and rejected on February 27, 1978, after an oral hearing and the filing of a Memorandum of Law by Respondent (attached hereto as Appendix C). Since this Petition for Writ of Certiorari was served upon counsel for Respondent on July 3, 1978, it was over a full month late.

II.

THE PETITION FOR WRIT OF CERTIORARI DOES NOT SET FORTH GRIEVANCES REVIEWABLE BY THIS COURT

The Motion of Petitioner addressed to the Supreme Court of Utah did not assert or claim any violation of the United States Constitution. Rather, the asserted claim was alleged existence of bias and prejudice under the Constitution of the State of Utah, a statute of the State of Utah, and a rule of procedure of the State of Utah. (See attached Appendix A and Footnotes 1, 2 and 3 herein.) Respondent filed a Memorandum of law with the Supreme Court of Utah which demonstrated the lack of merit under the Utah law as to all of the aforesaid claims (attached Appendix C). There is no claim or intimation now asserted in the Petition for Writ of Certiorari that the Utah Constitution, statute or rule relating to judicial disqualification offends or otherwise violates the Constitution of the United States. To the contrary, it now appears from the Petition for Writ of Certiorari that the prior arguments urged before the Supreme Court of Utah have been abandoned, since admittedly the claimed bias and prejudice "does not fit precisely into a proscribed situation or relationship . . ." (Petition, p. 6). Since neither the Utah Constitution nor its law or procedural rule is claimed to violate Petitioner's "due process of law," it is difficult to understand how action by the Supreme Court of Utah in affirming the admitted fact that bias and prejudice do not exist under such provisions could violate anyone's due process of law. The correct and unchallenged action of the Supreme Court of Utah in interpreting Utah's Constitutional and statutory provisions

could not constitute "state action" for review by the United States Supreme Court, nor could such by a bootstrap argument somehow be said to have enunciated some prohibited rule of law relative to bias or prejudice. The action of the Supreme Court of Utah could only be said to constitute denial of Petitioner's Motion, which itself only called for application of the facts under provisions of State law.

It is submitted that the highest court of a state is the sole judge and interpreter of the State's Constitution, Statutes and Rules of Procedure, and that this Court will not review alleged grievances which are within the cognizance of the highest court of the individual states. As stated in *Herb v. Pitcairn,* 324 U.S. 117, 125, 126, 89 L.Ed 789 (1945):

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis,* 20 Wall (U.S.) 590; *Berea College v. Kentucky,* 211 U.S. 45; *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U.S. 157; *Fox Film Corporation v. Muller,* 296 U.S. 207. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

Since no federal rights were at issue before the Utah Supreme Court of Utah, and since the Supreme Court of Utah correctly applied and interpreted provisions of state law, which unchallenged provisions of state law are not here under review, it is submitted that the alleged grievances are not reviewable by this Honorable Court.

III.

PETITIONER HAS FAILED TO RAISE A CONSTITUTIONAL ISSUE

Petitioner urged his Motion for an Order Disqualifying Judge Palmer on the basis of an alleged bias and prejudice because of a prohibited familial relationship pursuant to Article XIII, Section 13, Constitution of the State of Utah, a Utah statute, Utah Code Annotated, 17-7-1(2) (1953) and Rule 63(b) of the Utah Rules of Civil Procedure (see attached Appendix A and Footnotes 1 2 and 3). That Motion was denied unqualifiedly by the Supreme Court of Utah on February 27, 1978 (attached Appendix B). In his Petition for a Writ of Certiorari in this matter, Petitioner has conceded the technical correctness of the Order of the Utah Supreme Court by recognizing that Judge Palmer did not "fit precisely into a proscribed situation or relationship" as is defined in the aforesaid provisions of Utah law (Petition, p. 6).

This Court has recognized that matters of judicial qualification relating to kinship are within the discretion of the legislature, and absent a challenge to the constitutional validity of the statutes and provisions relied upon by the

Utah Supreme Court in denying Petitioner's Motion, Petitioner has failed to raise a constitutional issue. In *Tumey v. Ohio,* 273 U.S. 510, 522, 71 L.Ed 749, 47 S. Ct. 437, 50 A.L.R. 1243 (1926) this Court recognized that:

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interests would seem generally to be *matters of legislative discretion.* (Emphasis added.)

IV.

THERE WAS NO CONSTITUTIONALLY PROHIBITED BIAS OR PREJUDICE NOR THE APPEARANCE THEREOF IN THE CIRCUMSTANCES OF THIS CASE.

The provisions of Utah law relating to judicial disqualification which Petitioner urged before the Supreme Court of Utah as having been violated establish an objective standard by which disqualification is determined.[4] Under such objective standard, even assuming the truth of allegations presented in the Petition for Writ of Certiorari, a reasonable person would not infer that prejudice or bias existed, thereby foreclosing impartiality of judgment. See *Parrish v. Board of Commissioners of Alabama State,* 524 F4.2d 98 (5th Cir. 1975); *U.S. v. Corr,* 434 F. Supp 408 (S.D.N.Y. 1977). Even as related to the provisions of Utah law set forth in Petitioner's Motion to Disqualify (attached

[4]Canon 3C(1)(d) of the Judicial Code of Ethics, adopted by the Utah Supreme Court on March 1, 1974, also sets forth an objective, rather than subjective standard by which judicial disqualification is determined. See also 28 U.S.C. 455 (as amended 1974) and P.L. 93-512, House Re/No. 93-1453 4(1974).

Appendix A and Footnotes 1, 2 and 3), no factual foundation was established for disqualification of Judge Palmer on the basis that his "impartiality might reasonably be questioned" A fortiori, there is no basis for a new challenge here that there was violation of due process of law under the United States Constitution.

In his Memorandum Decision on Recusal in *Laird v. Tatum,* 409 U.S. 824, 837, 34 L.Ed 2d 50, 93 S. Ct. 7 (1972), Justice Rehnquist recognized with approval the unanimous conclusion of federal courts of appeal that a federal judge has a duty to sit where not disqualified, which is equally as strong as the duty not to sit where disqualified.

It is clear that under the only asserted state constitutional, statutory and regulatory provisions presented to the Supreme Court of Utah and argued there, no bias or prejudice could be asserted because under the circumstances of the case "the judge does not fit precisely into a proscribed situation or relationship" (Petition, p. 6). It is equally clear, even under Petitioner's allegations, that the judge does not fit into a proscribed violation of the due process clause.

CONCLUSION

For the reasons aforesaid, it is submitted that the Petition for Writ of Certiorari was not timely filed, such is not reviewable by this Court, and such does not present a constitutional issue nor establish constitutionally reviewable bias and prejudice. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

J. Thomas Greene
Dorothy C. Pleshe
CALLISTER, GREENE & NEBEKER
800 Kennecott Building
Salt Lake City, Utah 84133

DeLYLE H. CONDIE
500 Kennecott Building
Salt Lake City, Utah 84133
Attorneys for Intermountain Farmers Association

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

INTERMOUNTAIN FARMERS ASSOCIATION, a Utah corporation,
Plaintiff and Appellant,

- vs -

JIM FITZGERALD,
Defendant and Respondent.

Supreme Court
No. 14723

MOTION FOR AN ORDER DISQUALIFYING J. DUFFY PALMER, DISTRICT COURT JUDGE, AND FOR REHEARING

Based upon the affidavit of bias and prejudice attached hereto and pursuant to the Constitution of the State of Utah, Article XIII, Section 13: §78-7-1(2), Utah Code Annotated (1953); and Rule 63(b) of the Utah Rules of Civil Procedure, defendant and respondent herein, Jim Fitzgerald, moves that this court enter an order disqualifying J .Duffy Palmer, district court judge, from the above-entitled matter and granting defendant and respondent a rehearing pursuant to Rule 76(e) of the Utah Rules of Civil Procedure.

This motion for rehearing is based upon the affidavit of bias and prejudice filed this date by counsel for defendant and respondent. The right of defendant and respondent pursuant to Rule 76(e) of the Utah Rules of Civil Pro-

cedure to file a petition for rehearing and brief in support thereof is hereby expressly reserved. By order of this court, the petition for rehearing and brief may be filed on or before February 27, 1978.

Dated this 17th day of February, 1978.

Thomas R. Blonquist
Attorney for Defendant
and Respondent
Second Floor
Metropolitan Law Building
Salt Lake City, Utah 84111
Telephone: (801) 533-0525

The undersigned hereby declares that he caused to be delivered a copy of the foregoing motion to DeLyle Condie, Kennecott Building, Salt Lake City, Utah, and to J. Thomas Greene, 800 Kennecott Building, Salt Lake City Utah attorneys for plaintiff and appellant, this 17th day of February, 1978.

x/2

APPENDIX B

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

February 27, 1978

Office of the Clerk

THOMAS R. BLONQUIST, ESQUIRE
ATTORNEY AT LAW
METROPOLITAN LAW BLDG., 2d FLOOR
SALT LAKE CITY, UTAH 84111

Inermountain Farmers Association,
a Utah corporation,
Plaintiff and Appellant, No. 14723

v.

Jim Fitzgerald,
Defendant and Respondent.

This day respondent's motion for an order disqualifying J. Duffy Palmer, District Judge, and granting rehearing denied.

Geoffrey J. Butler, Clerk

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF UTAH

INTERMOUNTAIN FARMERS ASSOCIATION, a Utah corporation, *Plaintiff and Appellant,* vs. JIM FITZGERALD, *Defendant and Respondent.*	Supreme Court No. 14723

(Memorandum in Opposition to Respondent's Motion for An Order of Disqualification of Judge J. Duffy Palmer)

JUDGE J. DUFFY PALMER WAS NOT AND IS NOT SUBJECT TO DISQUALIFICATION IN THE PRESENT MATTER

Respondent in the above entitled action has filed an Affidavit of Bias and Prejudice asserting that a family relationship between Judge J. Duffy Palmer and Steven Lee Palmer, an employee of appellant Intermountain Farmers Association, gave Judge Palmer a "forejudgment, a bias and a prejudicial opinion in this case, which resulted in leaning toward IFA." (Paragraph 10 of Respondent's Affidavit of Bias and Prejudice.) Of course, the mere filing of such an Affidavit of bias and prejudice does not ipso facto disqualify Judge Palmer. *Haslam v. Morrison,* 113 Utah 14, 190 P.2d 520 (1948) Disqualification of a judge because of family relationship with a party to an action is governed by Article VIII, Section 13, Constitution of the

State of Utah, Utah Code Annotated, 78-7-1(2) 1953, and Rule 63(b), Utah Rules of Civil Procedure. In addition, Canon 3 of the Judicial Code of Ethics adopted by the Utah Supreme Court on March 1, 1974, is pertinent with respect to the guidelines in disqualification of a judge.

The Constitution of the State of Utah, Article VIII, Section 13, reads as follows in this respect:

> Except by consent of all parties, no judge of the Supreme or inferior courts shall preside in the trial of any cause where either of the *parties* shall be connected with him by affinity or a consanguinity within the degree of first cousin, or in which he may have been of counsel, or in the trial of which he may have presided in any inferior court. (Emphasis added.)

Likewise, Utah Code Annotated, Section 78-7-1, reads in pertinent part as follows:

> Except by consent of all parties, no justice, judge or justice of the peace shall sit or act as such in any action or proceeding:
> (1) . . .
> (2) When he is related to either *party* by consanguinity or affinity within the third degree, computed according to the rules of the common law. . . . (Emphasis added.)

In accordance with the above constiutional provision and statute, it is clear that certain requirements must be met before a judge is required to disqualify himself. First, the judge must be related to either *party* to the action. Secondly, such relationship must be either by consanguinity or affinity. Third, such relationship must be within the third degree, as computed according to the rules of common law.

It is admitted that Judge J. Duffy Palmer is the uncle of Steven Lee Palmer, an employee of IFA as set forth in Paragraph 6 of respondent's Affidavit and it is apparent that such relationship is within the third degree of consanguinity as computed according to the rules of common law. However, such a relationship is nevertheless insufficient to require the disqualification of Judge Palmer under the Statutory and constitutional provisions because Steven Lee Palmer is not a party to this action.

The issue of "who is a party" to an action for the purpose of disqualification of a judge has been variously decided. It is generally conceded, however, that a judge who is related to an agent or employee of a party is not disqualified where his relative's duties have no relation to the subject matter of the case. *Vilardo v. Sacramento County,* 54 Cal. App. 2d 413, 129 U.2d 165 (1942). The Code of Judicial Conduct approved by the Utah Supreme Court on May 1, 1974, limits the circumstances requiring disqualification of a judge where a corporation is a party to an action. Canon 3, Paragraph c(1)(d) expressly provides that a judge should disqualify himself in a proceeding where:

> (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:
>
> (1) is a *party* to the proceeding, or an *officer, director* or *trustee of the party;* (Emphasis added)

Title 28, U.S.C. § 455 (as amended 1974), regarding the disqualification of a federal judge, justice, magistrate or referee in bankruptcy reads identically to the above quoted Code of Judicial Conduct.

It is submitetd that the relationship of officer, director, or trustee of a corporate party is the applicable standard set forth by both the federal rule and the Code of Judicial Conduct as approved by the Utah Supreme Court. This emphasizes the principle that the party to whom the judge is related must have a *direct* interest in the subject matter or the result of the trial; an indirect or uncertain interest is insufficient to require the disqualification of a judge.

Furthermore, it would be going to absurd lengths and would place an unreasonable construction of Article VIII, Section 13, Constitution of the State of Utah, and Utah Code Annotated 78-7-1(2) (1953) to hold that the mere relationship of a judge in a prohibited degree to anyone who may be employed by a corporate party, would result in his disqualification. *Vilardo v. Sacramento County, supra.*

It is respectfully submitted, that under the Constitution and statutes of the State of Utah, as well as the Code of Judicial Conduct, Judge J. Duffy Palmer is not required to disqualify himself in this matter and the Motion of Respondent for an Order of Disqualification should be denied.

Dated this 24th day of February 1978.

CALLISTER, GREENE & NEBEKER
J. Thomas Greene
Attorneys for Plaintiff and Appellant
800 Kennecott Building
Salt Lake City, Utah 84133

Mailed a copy of the foregoing Memorandum to Thomas R. Blonquist Esq., 431 South Third East, Salt Lake City, Utah, 84111, this 24th day of February 1978.

Received a copy of the foregoing Memorandum this ..... day of February 1978.